No. [redacted] 37

In the Supreme Court of the United States

OCTOBER TERM, 1938

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, PETITIONER

v.

GEORGE ARENTS HUMPHREYS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

CITATIONS

142894—39

In the Supreme Court of the United States

OCTOBER TERM, 1938

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, PETITIONER

v.

GEORGE ARENTS HUMPHREYS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Almon G. Rasquin, Collector of Internal Revenue for the First District of New York, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on February 10, 1939, affirming the decision of the District Court of the United States for the Eastern District of New York.

OPINIONS BELOW

The District Court filed no opinion. The *per curiam* opinion of the Circuit Court of Appeals is reported in 101 F. (2d) 1012.

JURISDICTION

The judgment below was entered on February 10, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an irrevocable *inter vivos* transfer in trust is taxable under the Gift Tax Act of 1932 as amended where the donor reserves the power to change the beneficiaries of the trust but may not by any such alteration or amendment increase his personal interest in the trust estate.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 7–10.

STATEMENT

The complaint (R. 12–16) alleges that on December 27, 1934, the respondent executed an indenture of trust to trustees named therein to whom he delivered certain property to be held by them upon the trusts raised in the indenture. A copy of the indenture is annexed to the complaint, marked Exhibit A. (R. 17–38.)

Paragraph Seventh of the indenture is as follows (R. 24):

> This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor

> reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate.

On March 12, 1935, the respondent filed with the petitioner a gift tax return for the calendar year 1934 (R. 38–44, Ex. B, annexed to complaint) reporting the property conveyed pursuant to the indenture as a taxable gift of the value of $263,201.71 and a tax thereon in the amount of $11,181.14, which he paid to the petitioner on March 12, 1935.

On February 17, 1938, the respondent filed a claim for refund of the amount paid (R. 44–49, Ex. C, annexed to complaint) based on the allegation that the transfer pursuant to the trust indenture did not constitute an actual gift taxable under the Gift Tax Act of 1932. On March 11, 1938, the claim was rejected (R. 50–51, Ex. D, annexed to complaint).

A motion for summary judgment (R. 8) under the provisions of Rule 113, Rules of Civil Practice,

was made by respondent on June 29, 1938, upon respondent's affidavit (R. 9–11) verifying the cause of action set up in the complaint.

No papers were filed in opposition, petitioner's counsel stating to the court upon the hearing that the case was apparently indistinguishable from *Hesslein* v. *Hoey*, 91 F. (2d) 954 (C. C. A. 2d).

On July 13, 1938, an order was made granting the motion for summary judgment and judgment was accordingly entered in favor of respondent on July 14, 1938 (R. 5–7.) On appeal, the court below affirmed *per curiam* on the authority of *Hesslein* v. *Hoey, supra.*

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the transfer in trust here in issue, by the terms of which the settlor reserved the power to alter or amend the trust deed by substituting other beneficiaries for the beneficiaries named and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust but without the power to increase his personal beneficial interest in the trust estate, is not such a transfer as is subject to tax under the gift-tax provisions of the Revenue Act of 1932, as amended; and in failing to hold that the transfer in trust here in issue is subject to tax under the gift-tax provisions of the Revenue Act of 1932, as amended.

2. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The question involved in the present case and the Government's position with regard thereto are the same as in *Hesslein* v. *Hoey,* 91 F. (2d) 954 (C. C. A. 2d), certiorari denied, 302 U. S. 756. The same general question is also presented in *Estate of Charles Henry Sanford* v. *Commissioner,* No. 881, present Term, in which the Government has filed a memorandum not opposing certiorari. The Government's position in the latter case is inconsistent with its position in the present case, in the *Sanford* case its contention being that a transfer in trust is not a completed gift for the purposes of the gift tax until there is a relinquishment of the power to change the beneficial interests, although such power could not have been exercised in favor of the settlor of the trust, and in the present case its contention being that a taxable gift occurs where there is an irrevocable transfer in trust with the power to change beneficiaries but without the power to increase the settlor's personal beneficial interest in the trust.

The Government has been forced to this inconsistency of position because of the doubt as to the correctness of the *Hesslein* decision and because of the refusal of the taxpayer in the *Sanford* case, *supra,* to accept that decision as a correct statement of the law and because of the probabilities that other taxpayers also will not accept the *Hesslein* decision where it is not to their interest to do so.

The varying positions taken by both the taxpayers and the Government have created confusion in the administration of the statutory provision here involved, the question is a live one, and it is important from an administrative standpoint that it be settled by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

APRIL, 1939.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 511. GIFTS OF PROPERTY SUBJECT TO POWER.

Subsection (c) of section 501 of the Revenue Act of 1932 (relating to the inapplicability of gift tax in the case of the transfer of property in trust subject to the power of the donor to revest title in himself) is repealed. (U. S. C., Title 26, Sec. 550.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 402. CREDITS AGAINST TAX.

* * * * * *

(b) (1) If a tax has been paid under Title III of this Act on a gift, and thereafter upon the death of the donor any amount in respect of such gift is required to be included in the value of the gross estate of the decedent for the purposes of this title, then there shall be credited against the tax imposed by section 401 of this Act the amount of the tax paid under such Title III with respect to so much of the property which constituted the gift as is included in the gross estate, except that the amount of such credit (A) shall not exceed an amount which bears the same ratio to the tax imposed by section 401 of this Act as the value (at the time of the gift or at the time of the death, whichever is lower) of so much of the property which constituted the gift as is included in the gross estate, bears to the value of the entire gross estate, and (B) shall not exceed the amount by which the gift tax paid under Title III

of this Act with respect to so much of the property as constituted the gift as is included in the gross estate, exceeds the amount of the credit under section 301 (b) of the Revenue Act of 1926, as amended by this Act.

* * * * *

(U. S. C., Title 26, Sec. 536.)

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift. (U. S. C., Title 26, Sec. 550.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in the case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 79, promulgated under the Revenue Act of 1932:

ART. 3. *Transfers in trust.*—Where property is transferred in trust without an ade-

quate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. * * *

Treasury Regulations 79 (1936 Edition):

ART. 3. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1939